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ALEXANDER L. STEVAS,

No. 82-1389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

C. A. MUNDT, *Petitioner*,

v.

NL INDUSTRIES, INC., *Respondent*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in No. 82-1389 is:

Whether an award made under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.*, must include "back pay" for the period from the date of the violation to the date the case comes to trial, notwithstanding that the employee and employer had contractually agreed to limit severance pay for termination for any reason to one year's base salary.

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By letter dated April 26, 1983, the Clerk of this Court transmitted the Court's request that Respondent NL Industries, Inc. ("NL")[1] file an additional response to the Petition for Certiorari filed by Petitioner C. A. Mundt ("Mundt") in No. 82-1389.[2] The instant brief includes NL's opposition to Mundt's Petition, as requested by the Court. Also filed this date, pursuant to this Court's Rule 22.5, is NL's reply to Mundt's Brief in Opposition to NL's Cross-petition in No. 82-1489.

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[1] NL Industries, Inc. has no parent companies, or subsidiaries (except wholly owned subsidiaries) or affiliates which are publicly owned.

[2] NL had opposed Mundt's Petition as part of the brief as to its own Cross-petition for a writ of certiorari filed in No. 82-1489 at 14-15.

OPINIONS BELOW

The opinions below are set forth in the Appendix to NL's Cross-petition in No. 82-1489 at A-2 and A-6.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are set forth in the Petition at 2 and A17-A26, and the Cross-petition at 2.

STATEMENT OF THE CASE

For the purposes of NL's opposition to the Petition, NL herein incorporates by reference its statement of the case contained in the Cross-petition at 2-8.

Additionally, we note that while Mundt describes the issue raised by his petition as one of back pay, the Court of Appeals held that the District Court was confusing on the subject:

> The orders of the district court are unclear in that recovery at one point is referred to as "back pay" and yet at another point the recovery is referred to as an amount to include $93,000.00 for one year as provided by the termination provision in the employment contract and increased by $186,000.00 for two additional years "for the retaliatory discharge." [Cross-petition at A-3.]

The Court of Appeals did hold that an award of back pay would have been inappropriate because reinstatement was not sought. However, it also held that, as a matter of fact, the termination provision of the employment agreement governed the amount of damages available upon discharge. Because the termination of Mundt by NL was found to have been willful, the court held that the liquidated amount ($93,000) should be doubled pursuant to the Age Discrimination in Employment Act

("ADEA"), 29 U.S.C. § 626(b), rather than tripled as the trial court had done (Cross-petition at A-4).

REASONS FOR DENYING MUNDT'S PETITION

MUNDT RAISES NO SIGNIFICANT QUESTION OF FEDERAL LAW BECAUSE IT IS CLEAR THAT THE EXPRESS LANGUAGE OF ADEA AND ITS LEGISLATIVE HISTORY COMPEL THE CONCLUSION THAT AN AWARD OF BACK PAY IS NOT MANDATORY WHERE THERE HAS BEEN A VIOLATION OF THE ACT.

Contrary to Mundt's contention, nothing in ADEA, or this Court's decisions interpreting it, requires that "back pay" be awarded upon the finding of a violation. In fact, Congress specifically rejected using that term and instead imposed upon employers who have violated ADEA liability only for "amounts owing as a result of [such] violation." 29 U.S.C. § 626(b). In the case at bar, the Court of Appeals correctly held that the "amounts owing" were determined by the employment contract between the parties. Thus, while an award of back pay would be an appropriate measure of the "amounts owing" in some cases, *see, e.g., Cancellier* v. *Federated Department Stores*, 672 F.2d 1312 (9th Cir. 1982), in other cases, such as the case at bar, the "amounts owing" are properly determined by a different measure.

In *Lorillard* v. *Pons*, 434 U.S. 579 (1978), this Court stated that "the ADEA incorporates the FLSA [Fair Labor Standards Act, 29 U.S.C. § 216] provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII [42 U.S.C. §§ 2000e, *et seq.*], the availability of back pay is a matter of equitable discretion. . . ." *Id.* at 584 (citation omitted). Mundt, we submit, erroneously "reads this language to indicate a stronger right to back pay under the ADEA than under Title VII." Petition at 9. This Court's statement in *Lorillard* should be taken as meaning no more than that under ADEA a monetary

remedy is mandatory, while the monetary remedies described in Title VII are discretionary. The legislative history of ADEA supports this view.

In *Lorillard* v. *Pons*, *supra*, 434 U.S. at 578, the Court examined ADEA's history and observed that

> [t]he bill that was ultimately enacted is something of a hybrid, reflecting on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes.

Among the alternatives that this Court noted *(id.)* were rejected by Congress was S. 830, an Administration bill introduced by Senator Yarborough, which would have authorized the Secretary of Labor, *inter alia*, to impose "back pay" as a remedy for age discrimination.[3] Congress' rejection of this bill and its "back pay" language in favor of the "amounts owing" formulation makes it clear that the two terms are not equivalent. An analysis of the purpose of the penalties section of ADEA[4] further substantiates this view.

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[3] Section 7(b)(1) of S. 830 provided in pertinent part:

> If it is found that any person has engaged in an unlawful practice, the Secretary may issue an order requiring such person to cease and desist therefrom and to take such affirmative action, including reinstatement or hiring of employees, with or without *back pay*, as will carry out the purpose of this Act.

S. 830, 90th Cong., 1st Sess., 113 Cong. Rec. 2794, 2795 (1967) (emphasis supplied).

[4] Section 7(b) of ADEA, 29 U.S.C. § 626(b), provides in pertinent part:

> Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime for purposes of [Section 16] . . . of the Fair Labor Standards Act . . .: *Provided*, that liquidated damages shall be payable only in cases of willful violations of this Act.

In contrast to the discretionary back pay remedies available under Title VII[5] and the National Labor Relations Act ("NLRA"),[6] the ADEA, at 29 U.S.C. § 626(b), incorporates a mandatory monetary remedy scheme essentially equivalent to that provided in the penalties provision of the Fair Labor Standards Act, FLSA Section 16(b), 29 U.S.C. § 216(b). However, because the FLSA was designed to ensure compliance with this nation's "minimum wage" law,[7] the basis for determining the monetary remedy specified in Section 16(b) of the FLSA ("unpaid minimum wages or . . . unpaid overtime compensation") was not appropriate for the categories of employees subject to ADEA. Accordingly, although Section 16(b) of the ADEA imposes the FLSA's mandatory liability for violations (albeit specifying liquidated damages only for "willful violations"), the ADEA substitutes "amounts owing" for "unpaid minimum wages/overtime compensation" for purposes of ADEA penalties enforcement.

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[5] Section 706(g) of Title VII [42 U.S.C. § 2000e-5(g)] provides, in pertinent part:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . .

[6] Sec. 10(c) of the National Labor Relations Act [29 U.S.C. § 160(c)] provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

[7] *See*, 29 U.S.C. § 206 (Setting forth "minimum wage" rates and their applicability).

"Amounts owing" can, but does not necessarily, involve an award of back pay. While some courts have suggested that back pay may be one appropriate measure of the amounts owing to the subject of discrimination in certain cases, *see e.g.*, *Cancellier* v. *Federated Department Stores*, *supra*, *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 278 (3d Cir. 1980), the case at bar is not such a case. This is especially so because the employment contract, which Mundt has never claimed to be invalid, specified the amount to be paid upon involuntary separation and, moreover, because there is no issue of unpaid (or any kind of) "minimum wages."[8]

Never having attacked the validity of his contract before, Mundt argues here (Petition at 10) that the Court of Appeals' decision not to award him back pay has resulted in his being "penalized in his remedy for not being greedy." With due respect to him, Mr. Mundt has missed the point. There is no basis in the employment contract or under ADEA for acceptance of Mundt's current demand that this Court nullify the employment agreement and the intent of the parties expressed therein but rather make an independent factual finding that the amount owing to Mundt is three years of "back pay," which he then wants doubled.

The fallacy of Mundt's position manifests itself if we hypothesize that Mundt's case had been tried and decided three weeks, rather than three years, after his termination by NL. In that circumstance, Mundt would hardly be expected to contend that the base "amount owing" to him should be determined by multiplying his salary at termi-

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[8] Mundt's employment contract, the basis of the Court of Appeals' judgment as to the award, specified that he would be paid one year's salary, in his case $93,000, upon termination for any reason.

nation by the number of years, or *fraction of a year*, since his termination. Just as it would be inequitable for NL to attempt to avoid its contractual obligation by contending that the amount owed to Mundt should be *less than* that provided in the agreement, Mundt likewise should not be permitted to increase his recovery by urging that he is not bound by that agreement.

Severance pay agreements are valid and enforceable if the employer's offer with regard to severance pay is communicated to the employee and the employee accepts the offer "by his continuing to work for [the employer], with knowledge of the offer, until his services [are] no longer needed." *Ingrassia* v. *Shell Oil Company*, 394 F. Supp. 875 (S.D.N.Y. 1975). Where, as here, there was no expectation of a specific duration of employment and the amount agreed upon as liquidated damages is clearly reasonable, and a full year's salary of $93,000 surely is, the courts have enforced such provisions in lieu of other legal remedies. *Dayton Bread Company* v. *Montana Flour Mills Company*, 126 F.2d 257, 263 (6th Cir. 1942); *Jeannie-O Foods, Inc.* v. *United States*, 580 F.2d 400, 412 (Ct. Cl. 1978); *Frank's Nursery Sales, Inc.* v. *American National Insurance Company*, 388 F. Supp. 76 (E.D. Mich. 1974) (applying Ohio law—the law of the forum in this case).

In view of the parties' understanding, the reasonableness of the amount, and the fact that the courts below have held that Mundt was not the subject of unlawful age discrimination, it was entirely appropriate for the Court of Appeals to have ruled as it did on the issue of damages. Mundt here is essentially arguing that this Court should upset the factual underpinnings of the holding below; he is not addressing an important question of federal law. His petition therefore should be denied.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Cross-petition, NL Industries, Inc. respectfully submits that the Petition in No. 1389 should be denied.

Respectfully submitted,

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